MOHD SHAMSHIR MD RASID A

v.

PP

FEDERAL COURT, PUTRAJAYA B
ZAKI TUN AZMI CJ
ZULKEFLI MAKINUDIN FCJ
JAMES FOONG FCJ
[CRIMINAL APPEAL NO: 05-59-2008 (N)]
3 SEPTEMBER 2009 C

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Appeal against conviction and sentence - Admissibility of cautioned statement - Voir dire - Deferment of decision on voir dire by trial judge until after close of prosecution's case - Whether a serious misdirection - Whether cautioned statement a mainstay of prosecution's case - Reasonable doubt - Whether conviction unsafe* D

CRIMINAL PROCEDURE: *Voir dire - Admissibility of cautioned statement - Deferment of decision on voir dire by trial judge until after close of prosecution's case - Whether a serious misdirection - Whether cautioned statement a mainstay of prosecution's case* E

CRIMINAL PROCEDURE: *Trial - Voir dire - Admissibility of cautioned statement - Deferment of decision on voir dire by trial judge until after close of prosecution's case - Whether a serious misdirection - Whether cautioned statement a mainstay of prosecution's case* F

CRIMINAL PROCEDURE: *Statements - Cautioned statements - Admissibility - Deferment of decision on voir dire by trial judge until after close of prosecution's case - Whether a serious misdirection - Whether cautioned statement a mainstay of prosecution's case* G

EVIDENCE: *Statement - Cautioned statement - Admissibility - Deferment of decision on voir dire by trial judge until after close of prosecution's case - Whether a serious misdirection - Whether cautioned statement a mainstay of prosecution's case* H

The accused/appellant, charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') for trafficking in 366.1 grams of cannabis, was found guilty by the High Court and sentenced to death under s. 39B(2) of the DDA. His appeal to the Court of Appeal was unsuccessful and, dissatisfied, he appealed to this court. The facts were that the police, after setting up a road- I

A block, had stopped a car with four occupants, including the appellant. They conducted a body search on all four occupants and found packets of drugs on the driver and the appellant. More pertinent to this case, they also discovered a bag containing the cannabis with which the appellant was charged for trafficking and
B a few personal items belonging to the appellant. After the appellant was arrested, he made a cautioned statement to the police admitting to having purchased the drugs and subsequently putting it into the bag. He later challenged the admissibility of the cautioned statement and a *voir dire* was conducted to determine
C its admissibility. The trial judge, upon conclusion of the *voir dire*, did not make an immediate ruling on this issue. He expressly announced that he would defer his decision until after the close of the prosecution's case. The trial proper then proceeded, and at the close of the prosecution's case, the trial judge delivered his
D decision on the *voir dire*, holding that the appellant had voluntarily made the cautioned statement. The appellant contended before this court that the trial judge had misdirected himself in deferring the decision on the *voir dire*.

E **Held (allowing the appeal, and setting aside the conviction and sentence; appellant accordingly acquitted and discharged) Per James Foong FCJ delivering the judgment of the court:**

(1) The deferment of the decision on the admissibility of the
F cautioned statement under the circumstances as described was a serious misdirection by the trial judge. He should have made a decision after the *voir dire* on the cautioned statement and before proceeding further with the trial of the case proper. The deferment and the direction to proceed with the case
G proper until after the prosecution had closed their case had severely prejudiced the appellant. *Abdul Mahmud v. PP* (foll); *Yau Sun Fatt v. PP* (foll).

(2) The cautioned statement in this case was a mainstay of the prosecution's case. Without it, all that the prosecution had
H proved against the appellant was the presence of the bag containing the drugs and some of the appellant's personal belongings, and that this bag was found in the car occupied by four male adults of whom the accused was one. The appellant was neither holding the bag nor sitting directly in
I front of it and another person, one Aman, was seated directly behind the bag. Except for the appellant's personal belongings found in the bag, there was no evidence to link him to the

drugs. Most important was that from the evidence there was a reasonable likelihood that the bag could belong to any of the passengers in the car, in particular Aman. Regarding the personal items found in the bag, the appellant had explained in his defence that he had requested Aman to keep them for him in Aman's bag, and Aman could not be traced to give evidence for the prosecution or the defence. As the law required the appellant to only raise a reasonable doubt in his defence, this would be sufficient to rebut the prosecution's case that he was trafficking in the said drugs.

(3) Due to the serious misdirection by the trial judge as described, the conviction was unsafe to stand.

Bahasa Malaysia *Translation Of Headnotes*

Tertuduh/perayu, yang telah dituduh di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') kerana mengedar 366.1 gram kanabis, telah didapati bersalah oleh Mahkamah Tinggi dan dikenakan hukuman mati di bawah s. 39B(2) ADB. Rayuan beliau ke Mahkamah Rayuan tidak berjaya dan, tidak berpuas hati, beliau merayu ke mahkamah ini. Fakta-faktanya ialah bahawa polis, setelah menyediakan suatu sekatan jalan, telah menghentikan satu kereta dengan empat penumpang, termasuk perayu. Mereka telah menjalankan suatu pemeriksaan badan atas kesemua keempat-empat penumpang dan menjumpai paket-paket dadah atas pemandu dan perayu. Lebih berkaitan dengan kes ini, mereka juga menjumpai satu beg yang mengandungi kanabis yang perayu telah dituduh mengedar dan beberapa item-item peribadi kepunyaan perayu. Setelah perayu ditahan, beliau membuat satu pernyataan beramaran kepada polis mengaku bahawa beliau telah membeli dadah tersebut dan kemudian telah meletakkannya dalam beg itu. Beliau selepas itu mencabar kebolehterimaan pernyataan beramaran itu dan sesuatu *voir dire* telah dijalankan untuk menentukan kebolehterimaannya. Hakim perbicaraan, selepas kesudahan *voir dire* itu, tidak membuat satu keputusan serta-merta atas isu ini. Beliau mengumumkan secara nyata bahawa beliau akan menangguh keputusannya sehingga penghujung kes pendakwaan. Perbicaraan sebenarnya kemudian diteruskan, dan pada penghujung kes pendakwaan, hakim perbicaraan menyampaikan keputusannya atas *voir dire* itu, dan mendapati bahawa perayu telah membuat pernyataan beramaran itu dengan rela. Perayu mendakwa di

A hadapan mahkamah ini bahawa hakim perbicaraan telah menyalaharahkan dirinya dalam menangguhkan keputusan atas *voir dire* itu.

Diputuskan (membenarkan rayuan, dan mengenepikan
B **sabitan dan hukuman; perayu dibebaskan dan dilepaskan sewajarnya)**
Oleh James Foong HMP menyampaikan penghakiman mahkamah:

C **(1)** Penangguhan keputusan atas kebolehterimaan pernyataan beramaran itu dalam keadaan yang diterangkan adalah satu salah arahan yang serius oleh hakim perbicaraan. Beliau sepatutnya membuat suatu keputusan selepas *voir dire* itu atas pernyataan beramaran itu dan sebelum meneruskan dengan
D perbicaraan kes sebenarnya. Penangguhan itu dan arahan untuk meneruskan dengan kes sebenarnya sehingga selepas pendakwaan telah menutup kes mereka telah sangat memprejudiskan perayu. *Abdul Mahmud v. PP* (diikuti); *Yau Sun Fatt v. PP* (diikuti).

E **(2)** Pernyataan beramaran dalam kes ini merupakan tulang belakang kes pendakwaan. Tanpanya, apa yang hanya dibuktikan oleh pendakwaan terhadap perayu ialah adanya beg yang mengandungi dadah itu dan beberapa barang-barang kepunyaan perayu, dan bahawa beg ini telah dijumpai di dalam
F sebuah kereta yang ditumpang oleh empat lelaki dewasa dan perayu merupakan salah seorang dari mereka. Perayu tidak memegang beg itu ataupun duduk betul-betul di hadapannya dan seorang lagi, yang bernama Aman, duduk betul-betul di belakang beg itu. Melainkan barang-barang peribadi perayu
G yang dijumpai di dalam beg itu, tidak ada apa-apa keterangan lain untuk mengaitkannya dengan dadah tersebut. Paling mustahak ialah bahawa dari keterangan terdapat kemungkinan munasabah bahawa beg itu kepunyaan mana-mana satu penumpang dalam kereta itu, terutamanya Aman. Berhubung
H item-item peribadi yang dijumpai dalam beg itu, perayu telah menerangkan dalam pembelaannya bahawa beliau telah meminta Aman menyimpan barang-barang itu untuknya di dalam beg Aman, dan Aman tidak dapat dicari untuk memberi keterangan bagi pihak pendakwaan atau pihak pembelaan. Oleh
I kerana undang-undang memerlukan perayu untuk hanya

membangkitkan suatu keraguan munasabah dalam pembelaannya, ini mencukupi untuk mematahkan kes pendakwaan bahawa beliau mengedar dadah tersebut.

(3) Disebabkan salah arahan serius yang dibuat oleh hakim perbicaraan seperti yang diterangkan, sabitan itu tidak sah.

Case(s) referred to:
Abdul Mahmud v. PP [1980] 2 MLJ 51 ***(foll)***
R v. Francis and Murphy 43 Cr App R 147 ***(refd)***
Yau Sun Fatt v. PP [1988] 1 CLJ 160; [1988] 1 CLJ (Rep) 305 SC ***(foll)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 39B(1)(a), (2)

For the appellant - Hisham Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Nurul Huda Mohd Nor DPP

[Editor's note: For the Court of Appeal judgment, please see Mohd Shamshir Md Rashid v. PP [2008] 6 CLJ 738.]

Reported by Suresh Nathan

JUDGMENT

James Foong FCJ:

[1] The appellant was charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (DDA) for trafficking in 366.1 grams of cannabis on 11 March 2000. He was found guilty by the High Court and was sentenced to death under s. 39B(2) DDA. His appeal to the Court of Appeal was unsuccessful and his conviction and sentence affirmed. Dissatisfied, he appealed to this apex court.

[2] The facts of this case are rather straightforward. On 11 March 2000, the police set up a road-block along Jalan Kongkoi-Genting Peras, Jelebu, in Negeri Sembilan. At about 6.30pm they stopped a motor car bearing registration number BED 2621. There were four occupants. The driver was one Shafawi (SP8) and beside him was a person by the name of Subir. At the rear, directly behind SP8, was one other person by the name of Aman and then next to him was the accused.

A **[3]** A body search was conducted on all four occupants travelling in the said car and from the trousers of SP8 and the appellant packets of drugs were found. More pertinent to this case was the discovery, by the police officer (PW4) who conducted the search, of a bag with the brand name of "Puma" B placed underneath the driver's seat more towards the rear. Inside was the cannabis for which the appellant was charged for trafficking. Aside from the drugs, in the said bag was a bunch of house keys for access into the appellant's sisters' house, a medical certificate issued by the Kajang Hospital for the appellant and, an C outpatient card in the appellant's name issued by the same hospital.

[4] After the appellant was arrested, he made a caution statement to the police admitting to purchasing the said drugs and D subsequently putting it into the said bag. He also confirmed that he kept his medical certificate and his hospital card together with the keys to his sisters' house in the said bag and then placed the bag beneath SP8's seat.

E **[5]** At the trial in the High Court, the appellant challenged the admissibility of his caution on the ground that it was not voluntarily made. A *voir dire* (trial within a trial) was conducted to determine its admissibility. After the *voir dire* was concluded, the trial judge did not make an immediate ruling on this issue. He F expressly announced that he would defer his decision until after the close of the prosecution's case. The trial proper then proceeded, after the *voir dire*, with the prosecution calling SP9, the person who recorded the caution statement, to complete his testimony that he handed the caution statement after recording it G to the investigating officer SP6. The next witness was SP6 who completed his testimony after the interruption of the *voir dire*. With the close of the prosecution case and the normal offer of the prosecution's witnesses to the defence, the trial judge delivered his decision on the *voir dire*: that the caution statement by the H appellant was voluntarily made by the appellant. He then admitted it as an exhibit marked P20.

[6] It is on the deferment of the decision on the *voir dire* by the trial judge to after the close of the prosecution case, rather than immediately after it was completed, that the appellant I contends before us that the trial judge has misdirected himself. The reasons proffered: (a) the deferment of this decision amounts

to allowing the prosecution to re-open their case after it was closed; (b) the appellant was prejudiced and/or disadvantaged by having to conduct his case during the prosecution stage without the benefit of knowing whether his caution statement is to be admitted.

[7] This issue on the deferment of the decision of the trial judge was not raised in the High Court or the Court of Appeal. But as this is a point of law we decided to entertain it. This concerns an important aspect of the criminal procedural law relating to a fair trial accorded to an accused person.

[8] It is well settled that when a challenge is mounted by a person on the voluntariness of his caution statement it is incumbent upon the prosecution to establish it otherwise. To determine the admissibility of this caution statement, a *voir dire* or a trial within a trial has to be conducted by the trial judge. The trial of the case proper in the meantime is still in the prosecution stage. It is temporarily halted or put on hold for the *voir dire* to proceed. In the *voir dire*, the prosecution has to prove that the caution statement was voluntarily made by the accused, in the sense that it was not obtained by threat or inducement or with the hope of getting an advantage on a promise held out by a person of authority to the accused. To satisfy this, the prosecution must adduce evidence and the accused who made the caution statement is permitted to cross-examine any witness called by the prosecution. Similar rights are accorded to the prosecution to cross examine any witnesses of the accused called to negate the contention of the prosecution – see *Abdul Mahmud v. Public Prosecutor* [1980] 2 MLJ 51.

[9] It is our view that after the close of the *voir dire*, it is imperative upon the trial judge to make a decision as to whether the caution statement is voluntarily made by the accused. It is necessary that until the trial judge makes his decision this document has yet to be admitted as evidence for the prosecution's case. The trial proper should not recommence until after this decision is made. If the decision on the admissibility of the caution is delayed and the case proper is directed to continue then both the prosecution and defence would be uncertain as to how to conduct his case in the meantime. For the prosecution, if the caution statement is rejected they may wish to call further evidence to prove their case. Otherwise, they may be confident to

rest on the caution statement and on whatever evidence they have advanced thus far. For the defence, there is the difficulty on how to frame questions for cross-examination of the remaining prosecution witnesses; whether to ask questions relating to the contents of the caution statement or to leave it out. If questions are directed to the contents of the caution statement, corresponding replies may prejudice the accused if the court were to subsequently decide to reject the caution statement. So a decision on the admissibility of the caution statement after the *voir dire* is crucial to both the prosecution and the defence before the trial proper proceeds further. Any delay with this decision (and certainly if delivered only after the close of the prosecution case) would be prejudicial to both the defence and the prosecution. It is our view that this must be avoided and the trial judge must decide on the admissibility of the caution statement before proceeding with the trial proper. This approach has been adopted in *Abdul Mahmud v. Public Prosecutor (supra)* where Justice Syed Agil Barakbah declared:

> At the close of the case *(voir dire)* the court has to make a decision whether the statement (caution statement) was made voluntarily or otherwise.

[10] A similar sentiment is expressed in the Supreme Court decision of *Yau Sun Fatt v. Public Prosecutor* [1988] 1 CLJ 160; [1988] 1 CLJ (Rep) 305 where Lee Hun Hoe CJ (Borneo) repeated what Parker LCJ said in *R v. Francis and Murphy* 43 Cr. App. R 147, 146:

> It has always been the settled practice in cases of this sort for a challenge to be made to the admissibility of the statement at an early stage in the absence of the jury. The matter is set out in the 34th (1959) Ed. Of Archbold's Criminal Pleadings, etc., at paras. 1114 and 1115. 'The proper course', it is said there, 'where objection is raised to the admissibility of an alleged confession, is for the judge to hear evidence in the absence of the jury and to rule upon that evidence whether the alleged confession should be admitted or not.' The passage goes on to say that the evidence of the prisoner may be admitted to that stage. Then, if the evidence is admitted, 'the weight and value of a confession remain matters for the jury.' It is quite clear that a prisoner is entitled both to a ruling on admissibility from the judge and also to hear the verdict of the jury on the weight and value of the confession.

[11] Based on the rational set out above, we consider the deferment of the decision on the admissibility of the caution statement under the circumstances as described is a serious misdirection by the trial judge. He should have made a decision after the *voir dire* on the caution statement and before proceeding further with the trial of the case proper. By deferring this decision and directing to proceed with the case proper until after the prosecution has closed their case has, in our opinion, severely prejudiced the appellant.

[12] From our perusal of the appeal record, the caution statement in this case is the mainstay of the prosecution case. Without this caution statement all that the prosecution has proved against the appellant was the presence of the said bag containing drugs and some personal belongings of the accused and that this bag was found in the said car occupied by four male adults of whom the accused was one. The appellant was neither holding the said bag nor sitting directly in front of it. Another person, Aman, was seated directly behind the bag. Except for the appellant's personal belongings found in the bag, there is no evidence to link the accused to the drugs. Most important is that from the evidence, there is a reasonable likelihood that the bag could belong to any of the passengers in the car, Aman in particular. Regarding these personal items found in the bag, the appellant has explained in his defence that he had requested Aman to keep them for him in Aman's bag and Aman could not be traced to give evidence for the prosecution or the defence. As the law requires the appellant to only raise a reasonable doubt in his defence this would be sufficient to rebut the prosecution case that he was trafficking in the said drugs.

[13] Due to the serious misdirection by the trial judge as described, we consider the conviction unsafe to stand. We therefore allow this appeal and set aside the conviction and sentence. The appellant is accordingly acquitted and discharged.